In the Supreme Court of the United States

OCTOBER TERM, 1942.

NO. . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

NO. . . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

NO. . . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

A. FRANCIS PORTA,
W. A. BARNETT,
C. W. KING,
Attorneys for Petitioner.

A. L. HERR,
Of Counsel.

December, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

INDEX

Cases Cited

STATUTES CITED

TEXT BOOKS CITED

In the Supreme Court of the United States

OCTOBER TERM, 1942.

NO. . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

NO. . . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

NO. . . . . .

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRITS OF CERTIORARI

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Oklahoma Tax Commission of the State of Oklahoma, your petitioner herein, being aggrieved of judgments of the United States Circuit Court of Appeals for the Tenth

Circuit entered the 13th day of November, 1942, in Causes Nos. 2558, 2559, and 2560, styled *United States of America, Appellant,* v. *Oklahoma Tax Commission of the State of Oklahoma, Appellee,* respectfully petitions review thereof upon the issues of law hereinafter stated, praying writs of certiorari for the purpose, and as cause and grounds therefor respectfully shows:

I

Statement of Matter Involved

Petitioner is a body created by the laws of the State of Oklahoma, and is charged with the duty of collecting the state and inheritance taxes due the State of Oklahoma. Respondent, United States of America, prosecutes this action in its own behalf and in behalf of the estates of Lucy Bemore, a deceased full-blood Seminole Indian, Nitey, a deceased full-blood Seminole Indian, and Wosey Deere, a deceased full-blood Cherokee Indian. Petitioner assessed an inheritance tax against the estates of each and all of said deceased Indian estates, which tax was paid by the Secretary of Interior under protest. The United States of America then brought its three separate actions in the District Court of the United States for the Eastern District of Oklahoma to recover the tax so paid. The action was brought under provisions of Title 68, Oklahoma Statutes, 1941, Section 1475, Title 68, Oklahoma Statutes Annotated, Section 1475.

Case No. 2558 relates to the estate of Lucy Bemore, deceased. Lucy was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1563. She died intestate

December 23, 1932, while a resident of the State of Oklahoma. She left surviving, her husband, Lewis Bemore, a one-fourth (¼) blood Creek Indian, and her son, Thomas, an unenrolled Seminole Indian, who inherit her estate in equal parts. At the time of her death, she owned an estate of the gross value of $264,212.18, which estate was valued by the Oklahoma Tax Commission, for inheritance tax purposes, at the net value of $250,630.77, upon which the Oklahoma Tax Commission assessed an inheritance tax of the sum of $5,925.20. Said gross estate consisted of the homestead and surplus allotment of said deceased, also forty-three (43) acres of land purchased for her out of restricted funds of said deceased, title to which was taken in her name on a restricted form deed. Said real estate was of the gross value of $13,000.00 at the time of her death. She also owned at the time of her death, mineral leases in the sum of $46,204.04, executed on her surplus and homestead allotments, and cash credits in the sum of $205,008.14, which cash credits represented proceeds from the sale of oil and gas derived, produced from the lands purchased for her, above stated. All of the above lands at the time of her death were restricted from alienation and encumbrance. The Secretary of Interior never at any time issued any instrument removing restrictions on said lands, nor any part thereof.

A certificate designating both the homestead and surplus allotment of said deceased as tax exempt was duly filed for record in the office of the County Clerk of Seminole County, Oklahoma, and was exempt from taxation at the time of her death.

Case No. 2559 relates to the estate of Nitey, who is also a full-blood Seminole Indian. She died testate, August 17, 1913, a resident of the State of Oklahoma. By her Will, she devised her estate to her five surviving full-blood Seminole children in equal shares. Her gross estate at the time of her death was valued at the sum of $752,751.97, and was valued by the Oklahoma Tax Commission for inheritance tax purposes at the net value of $677,593.38. Her estate consisted of a homestead allotment of forty (40) acres and her surplus allotment of two hundred (200) acres, of the value of $32,078.00; United States Treasury Bonds credited to her account at the time of her death in the sum of $203,812.50, interest accrued on the bonds in the sum of $881.25; cash credited to her account in the sum of $513,380.22; and household goods and a truck, valued at $2,600.00. The cash credited resulted from the sale of oil and gas derived from production upon her homestead and surplus allotments, and was at the time of her death under the exclusive control and supervision of the Secretary of Interior. Upon the net value of her estate, the Oklahoma Tax Commission assessed an inheritance tax in the sum of $16,053.74. The Secretary of Interior never at any time issued any instrument removing restrictions from said lands, nor any part thereof, and said lands remained restricted from alienation or encumbrance at the time of her death.

A certificate designating one-hundred-sixty (160) acres of Nitey's land, being her homestead, and one-hundred-twenty (120) acres of surplus land, as tax exempt, was duly filed for record in the office of the County Clerk

of Seminole County, Oklahoma, and was exempt from taxation at the time of her death.

Case No. 2560 relates to the estate of Wosey Deere, a full-blood Creek Indian, enrolled as such opposite Creek Roll No. 9546. She died intestate September 2, 1938, while a resident of the State of Oklahoma. Her estate was inherited by her husband, Milford Thomas, a seven-eighths (7/8) blood Creek Indian; two daughters and one son, all full-blood Creek Indians. She owned an estate at the time of her death of the gross value of $359,643.45, which estate was valued by the Oklahoma Tax Commission, for inheritance tax purposes, at the net value of $318,794.07, upon which estate the Oklahoma Tax Commission assessed an inheritance tax in the sum of $14,908.67. The estate consisted of her homestead and surplus allotments; one-hundred-sixty (160) acres inherited from her grandfather, and also a four-fifths (4/5) interest in eighty (80) acres of land in Section Two (2), Township Fourteen (14) North, Range Seven (7) East, Creek County, Oklahoma; United States Treasury Bonds, the accrued interest on the bonds, which bonds were derived from the proceeds derived from the sale of oil produced from her allotted lands, and were at the time of her death under the exclusive control of the Secretary of Interior; also cash credits under the control of the Secretary of Interior derived from the same source; and small items of other personal property which was also at all times under the control and custody of the Secretary of Interior. That all of said property was restricted, and remained restricted in the hands of the heirs of Wosey Deere. The Secretary of Interior never at any time, by any instru-

ment removed the restrictions on the land of said deceased, nor any part thereof, and such land was restricted from alienation and encumbrance at the time of her death.

A certificate designating one-hundred-sixty (160) acres of said decedent's lands, being the homestead, and surplus allotment of said deceased as tax exempt was duly filed for record in the office of the County Clerk of Creek County, Oklahoma, and was exempt from taxation at the time of her death.

The estate of Lucy Bemore, deceased, was assessed under the provisions of Section 12469, Oklahoma Statutes, 1931, Chapter 162, Oklahoma Session Laws, 1915, which is as follows:

> "A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom.
>
> "When the transfer is of tangible property in this state made by any person, or of intangible property made by a resident of this state at time of transfer:
>
> "First: By will or the intestate laws of this state;
>
> "Second: By deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death;
>
> "Third: When the transferee becomes benefically entitled in possession or expectancy by any such transfer whether made before or after the passage of this Act. Said tax shall be upon the clear market value of such property."

The tax against the estates of Nitey and Wosey Deere, deceased, was assessed under the provisions of Section 1, Art. 5, Chap. 66, Sess. Laws 1935, which is as follows:

> "A tax is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, or corporations, of property, real, personal or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. Such tax shall be imposed upon the value of the net estate and transfers at the rates, under the conditions, and subject to the exemptions and limitations hereinafter prescribed."

These assessments, as before stated, were paid under protest by the Secretary of Interior, and three separate actions brought in the United States District Court for the Eastern District of Oklahoma, to recover the tax so paid. The cases were submitted to the trial court under a stipulation of facts. The respondent, United States of America, pitched its suits:

1. Upon the theory that the devolution of the estates was cast under the laws of the United States, and not under the laws of the State of Oklahoma.

2. That the taxes laid constituted a direct burden upon a governmental instrumentality.

The trial court decided these issues against the respondent. Appeals were taken by respondent to the United States Circuit Court of Appeals for the Tenth Circuit, which

Court reversed the judgments of the trial court and remanded the causes to the United States District Court of the Eastern District of Oklahoma, with instructions to enter judgment in favor of the plaintiff. The cases were consolidated upon appeal. (Tr. 3.)

II
Jurisdiction

The original jurisdiction of the Federal Court in this cause is based on Section 24, Judicial Code, as Amended, Title 28, U. S. C. A., Section 41.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is claimed under the provisions of Subdivision (a) of Sec. 347 of Tit. 28, U. S. C. A., being Sec. 240 of the Judicial Code, as amended. This review is sought by writ of certiorari.

The statutes of Oklahoma under which the assessment was laid, and the validity thereof as applied to the estates here involved, consists of:

"Section 12469, Oklahoma Statutes 1931:

"Section 1, Article 5, Chapter 66, Session Laws 1935, *supra.*"

The applicability of the above sections of the statutes and the right of the Oklahoma Tax Commission to assess inheritance tax against the estates here involved thereunder was directly raised and put in issue by the pleadings and stipulation of facts, and was raised in the Circuit Court of Appeals for the Tenth Circuit, which Court decided the

issues adversely to the contention of the petitioner. The judgment of the Circuit Court of Appeals for the Tenth Circuit, which this petitioner seeks to review, was entered on the 13th day of November, 1942.

A copy of the opinion of the Circuit Court of Appeals is found in this transcript, beginning at page 151. The dissenting opinion is found beginning at page 157.

III
Questions Presented

The review prayed for by this petition will present the following questions:

(1) Did the right of the deceased Indian allottees to transmit their estates upon their death, and the right of their heirs or beneficiaries to receive the same, flow from a law of the United States of America, or from the laws of the State of Oklahoma?

(2) Does the tax, as laid against the estates in the instant cases, constitute a direct burden upon a governmental instrumentality?

(3) The case of *Childers* v. *Beaver*, 270 U. S. 559, is not applicable to the facts in this case, but is distinguished upon the ground fully to be set forth in supporting brief.

(4) If the case of *Childers* v. *Beaver, supra*, be held applicable, the petitioner will contend that said case should no longer be followed, but should now be definitely overruled.

(5) The Supreme Court of this State, in the case of *Childers* v. *Pope*, 119 Okla. 300, 249 Pac. 726, reached an erroneous conclusion, and should not be followed by this Court.

IV
Reasons for Allowance of the Writ

Petitioner, as reasons for allowance of the writ of certiorari, proposes the following:

(1) The Circuit Court of Appeals has decided an important question of Federal Law which has not been heretofore decided, but should be decided and settled by this Court, the question being:

> "Does the transfer of the estates of deceased full-blood Indians of the Five Civilized Tribes, upon the death of a full-blood member of such tribe, take place under and by virtue of the laws of the United States of America, or under and by virtue of the laws of the State of Oklahoma?"

(2) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court in the cases of:

Jefferson v. *Fink*, 247 U. S. 288.

Blundell v. *Wallace*, 267 U. S. 373.

(3) The rule announced by this Court in the case of *Childers* v. *Beaver*, 270 U. S. 555, if held applicable to the facts in this case, should now be reconsidered and overruled.

Wherefore, petitioner prays that writ of certiorari shall issue, addressed to United States Circuit Court of

Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court for review and determination, a full and complete transcript of the records and all of its proceedings in said Causes Nos. 2558, 2559, and 2560, entitled *United States of America, Appellant,* v. *Oklahoma Tax Commission of the State of Oklahoma, Appellee,* and that upon such writ and review, the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, made and entered on the 13th day of November, 1942, in the above designated causes, shall be reversed, and that the judgment of the trial court, the United States District Court for the Eastern District of Oklahoma, be affirmed. Petitioner further prays that it shall have such other and further relief in the premises to which this Court shall find it duly entitled.

A. FRANCIS PORTA,

W. A. BARNETT,

C. W. KING,

Attorneys for Petitioner.

A. L. HERR,
Of Counsel.

December, 1942.

BRIEF IN SUPPORT OF PETITION

(Emphasis Supplied.)

The facts are fully set forth in our petition for allowance of the writ and we deem it unnecessary to here repeat the same.

The question herein involved concerns the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estates of full blooded restricted deceased Indians, members of the Five Civilized Tribes.

Petitioner asserts the right so to do. Protestants contest such right and in the trial court based their protest on two propositions:

1. The devolution and transfer of the estates are governed and controlled by the laws of the United States of America and not by the laws of the State of Oklahoma.

2. The tax as laid constitutes a direct burden upon a governmental instrumentality.

The trial court decided the issues in favor of petitioner. The Circuit Court of Appeals for the Tenth Circuit, on appeal, reversed the judgment of the trial court, that court holding that the devolution and transfer of the estates was governed by the laws of the United States of America, and not by the laws of the State of Oklahoma. It based its conclusions on the decision of this Court in the case of *Childers* v. *Beaver*, 275 U. S. 555, and the decision of the Supreme Court of the State in the case of *Childers* v. *Pope*, 119 Okla. Rep. 300, 249 Pac. 726.

It is the contention of petitioner that the devolution and transfer of these estates are governed by the laws of the State of Oklahoma, and that the State, therefore, has authority to assess an inheritance tax upon such transfers; that the cases, *Childers* v. *Beaver*, and *Childers* v. *Pope*, are not applicable but if held applicable, should no longer be followed.

We will present our argument in support of our contention upon three propositions:

1. The devolution and transfer of estates herein involved are governed and controlled by the laws of the State of Oklahoma and not by the laws of the United States of America.

2. The decisions in the cases of *Childers* v. *Beaver* and *Childers* v. *Pope, supra*, are not applicable. If held applicable, they should no longer be followed.

3. The tax as laid does not so constitute a direct burden upon a governmental instrumentality.

Proposition No. 1

The devolution and transfer of the estates herein involved are governed and controlled by the laws of the State of Oklahoma and not by the laws of the United States of America.

In discussing this proposition we concede that Congress has a right to control the devolution and transfer of the estates of full blood Indians; and that it has a right to deny a state the power to assess an inheritance tax upon the transfer of such estates. It is our contention, however, as applied to estates of full blood Indians of the Five Civilized Tribes in Oklahoma, it has never assumed to exercise such power.

Prior to the time the Federal Government adopted the policy of allotting the lands of the Five Civilized Indian Tribes in severalty to the members thereof, Congress had passed no Act governing the devolution or transfer of such estates.

Prior to that time such estates descended according to tribal laws and usage and custom of the Tribes. The first Act passed by the Congress touching this question, so far as we are aware, was the Act of May 2, 1890, 26 Stat. 81. The lands of the Five Civilized Tribes, at that time, were located in the territory composing the Indian Territory.

By that Act Congress put in force in the Indian Territory several Statutes of the State of Arkansas, including Chapter 49 of Mansfield's Digest, relating to descent and distribution. By its Act of April 28, 1904, 33 Stat. 573, Sec-

tion 2, Congress continued in force such laws and somewhat extended their operation. This Section of the Act provides:

> "All of the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indians, Freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Court in said Territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indians, Freedmen or otherwise."

Thereafter, and in allotting the lands in severalty to the Indian members thereof, Congress, in each allotment Act inserted a provision that the land so allotted should descend according to the law of descent and distribution of the State of Arkansas. See Sec. 6, Act June 30, 1902, as applied to Creeks; and Sec. 2, Act June 2, 1900, as applied to Seminoles.

This in brief constitutes the history of Congressional legislation upon the devolution of the estates of full blood Indians prior to the admission of the Territory into the Union as a State.

The Indian Territory and Oklahoma Territory were admitted into the Union as a single State on November 16, 1907, under the Act of Congress of June 16, 1906, 34 Stat. 267, authorizing such admission, commonly known as the Enabling Act. Section 21 of this Act in part provides:

> "* * * and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, ex-

> cept as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

Upon the adoption of this Act and the admission of the State into the Union the laws of the State of Oklahoma relating to descent and distribution, became laws of the State. Such laws insofar as they relate to the estates of the Five Civilized Tribes are now laws of the State. Their estates are administered under and by virtue of the laws of the State and the heirs are determined under the provision of such laws. The devolution of their estates are governed by such laws and the State has therefore a right to assess an inheritance tax upon the transfer of such estates. This position is sustained by this Court in the case of *Jefferson* v. *Fink*, 247 U. S. 288. The Court, among other things, there said:

> "The State was admitted to the Union November 16, 1907; and thereupon the laws of the Territory of Oklahoma relating to descent and distribution (Rev. Stats. Okla. 1903, c. 86, art. 4) *became laws of the State.* Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, s. 9, *recognized and treated 'the laws of descent and distribution of the State of Oklahoma as applicable to the lands allotted to members of the Five Civilized Tribes.*"

The Court had there under consideration the question as to whether upon the death of a full blood Creek Indian after the admission of the State into the Union, his estate descended according to the laws of descent and distribution of the State of Oklahoma or under the laws of descent and distribution of the State of Arkansas. The Court held that

the descent was cast under the laws of the State of Oklahoma and in so doing definitely held that when the State was admitted into the Union the laws of descent and distribution of the Territory of Oklahoma became the *Laws of the State.* While the Court in the above case did not have under consideration the identical question herein involved, we think the case applicable here.

We also think the case of *United States* v. *Pridgeon,* 153 U. S. 48, applicable. In that case, Congress by its Act of May 2, 1890, placed in force in Oklahoma Territory certain provisions of the Criminal Code of Nebraska. Such code contained a section making horse stealing a separate offense. One of the questions presented in the case was whether the violation of this section constituted a violation of a law of the United States of America or whether it constituted a violation of the law of the Territory of Oklahoma.

The Court held it constituted a violation of the law of the Territory of Oklahoma and in so doing, among other things, said:

> "But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the Territory of Oklahoma had the effect of making larceny or horse stealing an offense against the United States, punishable on the federal side of the courts of the territory. The Supreme Court of the Territory has held that the Criminal Code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial legislature, and was to be dealt with as if the crimes thereby declared were crimes, not against

> the United States, but against the territory. Thus, in *Ex parte Larkin*, 1 Okla. 53, 57, 25 Pac. 745, GREEN, C. J., says: *'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the Territory of Oklahoma,* and that they should sustain the same relations to the courts and to the people of the territory, and to the legislative assembly, as a code of laws enacted by the legislative assembly."

We think what is there said is peculiarly applicable to the case at bar. When Congress, by the Enabling Act, put in force in the new state the laws of descent and distribution of the State, it was intended that said laws should constitute state laws as distinguished from the laws of the United States. See also the case of *Blundell* v. *Wallace*, 267 U. S. 374.

We think these cases, by analogy at least sustain our contention that the devolution of the Indian estates herein invoived are governed by the laws of the State of Oklahoma rather than by the laws of the United States of America. This view undoubtedly conforms to the individual views of the majority of the Circuit Court of Appeals, as may be seen by reference to the closing paragraph of the opinion in that case wherein the Court said:

> "Restricted Indians in Oklahoma enjoy the privileges and protection of local laws. The local courts are open to them for the redress of grievances. The estates of deceased members of the Five Civilized Tribes are administered in the county courts of Oklahoma. Their wills are probated and their heirs determined in such courts. Members of the Five Civilized Tribes are citi-

> zens of Oklahoma and enjoy the privileges and benefits of that citizenship. It would seem to the writer of this opinion that the Enabling Act should be construed as consenting to the application of the local law of Oklahoma with respect to the devolution of property of Indians who are domiciled in and residents of that State, and that such property should be regarded as passing under the laws of Oklahoma and subject to inheritance tax by Oklahoma, but that view could only prevail if *Childers* v. *Beaver, supra,* were overruled. Whether it shall stand or be overruled, only the Supreme Court of the United States may decide." (Tr. 156.)

It is thus apparent, had this matter been submitted to the Circuit Court of Appeals, as an original proposition, that Court would have sustained the power of the State to assess the tax. We think, however, the Court was in error in holding the case of *Childers* v. *Beaver, supra,* binding and controlling. It is our contention that this case can and should be distinguished from the case at bar, as we shall hereinafter attempt to show. If, however, the case cannot be distinguished, it is our further contention, for the reason heretofore stated, that it should be reconsidered and overruled. This brings us to the discussion of the following question:

Proposition No. II

The decision of this Court in the case of *Childers* v. *Beaver*, *supra*, and the decision of the Supreme Court of the State in the case of *Childers* v. *Pope*, *supra*, are not applicable and controlling. If held controlling, should no longer be followed.

It is true that this Court in the case of *Childers* v. *Beaver*, in considering the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estate of a full blood Quapaw Indian, held that such lands passed under a law of the United States, and not by Oklahoma's permission, and that the State was therefore without power or authority to assess an inheritance tax upon the transfer of such estate.

The Court there however, had under consideration a different statute, a statute not applicable to the Five Civilized Tribes. The Court there was considering the Act of June 25, 1910, 36 Stat. 855-856, as amended by the Act of February 14, 1913, 37 Stat. 678. This Act was passed subsequently to the enactment of Section 21 of the Enabling Act, and therefore operated to supersede that Act insofar as it pertained to the devolution of the estates of Quapaw Indians.

The right to so supersede the state law of descent and distribution, as applied to full blood restricted Indians, was reserved by Congress by Section 1, of the Enabling Act. We think Congress had the right to supersede the state law in this respect, under its general constitutional authority to legislate for and in behalf of Indians and the

Indian Tribes. Congress, however, as before stated, has never assumed to exercise such authority as pertains to estates of members of the Five Civilized Tribes. Therein lies the distinction between the case of *Childers* v. *Beaver, supra,* and the case at bar. Section 1 of that Act, there under consideration, in part provides:

> "When any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, *the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.* * * *" (U. S. C. A., Tit. 25, Sec. 372.)

Section 2, of that Act, provides:

> "Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided, further,* that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the In-

terior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided, further,* that the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided, also, that this and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians.*" (U. S. C. A., Tit. 25, Sec. 373.)

It will be observed that under Section 1 of the Act, *supra*, the Secretary of the Interior is given the power and authority to ascertain the legal heirs of deceased Quapaw Indians and under the provisions of Section 2, the Secretary is given the power to control the execution of wills; they can have no force and effect unless and until approved by the Secretary.

Under this Act the Courts of Oklahoma have no authority or power to determine the heirship of deceased Quapaw Indians. The law of Oklahoma has no operation or effect whatever upon the execution of the will of such Indians or the validity thereof. This being true, we think it may well be said that the devolution and transfer of the estates of deceased Quapaw Indians are controlled by

specific provisions of the Federal Law and that the law of the State, as such, has no force or effect upon the devolution of these estates.

Moreover, the Act itself specifically provides that it shall have no application to the Five Civilized Tribes or the Osage Indians.

We think the distinction here sought to be made is well illustrated by a comparison of the cases of *Blanset* v. *Cardin*, 256 U. S. 319, and *Blundell* v. *Wallace*, 267 U. S. 374.

In the Blanset case, there was involved the right of a full-blood Quapaw Indian to by will disinherit her husband. The Oklahoma law, Sec. 11224, Compiled Statutes 1921, then in force in the State of Oklahoma, provided among other things, as follows:

> "* * * No man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband."

It was the contention of the husband in that case that the state statute was controlling and that he had a right therefore to inherit one-third of the estate of his wife. This Court denied that contention but in so doing, based its reasoning upon the Act of June 25, 1910. The Court held that the will was executed under and by virtue of the laws of the United States, that the above Act specifically directed the manner in which the will should be executed and that such act therefore controlled the execution of the will

rather than the state law. This same question was also before the Court in the case of *Blundell* v. *Wallace*, *supra*, wherein was considered the question of the right of a half-blood Choctaw woman to, by will, disinherit her husband.

The same contention was there made by the husband, as was made in the Blanset case, that is, that the will was void under the state law which prohibited a married woman from willing away from her husband more than two-thirds of her estate. The wife claimed the right so to do under the provision of Section 23, of the Act of April 26, 1907. This Act provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

This Court denied such contention and held the state statute controlling, and in distinguishing the case from the Blanset case, *supra*, said:

> "Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the State Supreme Court that Congress intended thereby to enable 'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto.' The effect of Sec. 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in

Blanset v. *Cardin*, 256 U. S. 319, cited to the contrary, which militates against this view. *That case involved the will of a Quapaw woman devising her restricted lands away from her husband. It was held that Sec. 8341 of the Oklahoma laws did not apply because it was in conflict with an act of Congress. But the act there considered was very different from the one now under review.* There the authority to dispose of restricted property by will was limited by the provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, that the will must be 'in accordance with regulations to be prescribed by the Secretary of the Interior,' and that no will 'shall be valid or have any force or effect unless and until it shall have been approved' by that officer. By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. *But here the federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso;* and, clearly, it does not stand in the way of the operation of the local law."

We submit that the distinction made by this Court between the Blundell case and the Blanset case is applicable here; that the Childers case should be distinguished from this case upon the same theory, and that the Circuit Court of Appeals was in error in considering itself bound by that case.

We do not believe that this Court in that case, intended to hold that the laws of descent and distribution of the State, as applied to the devolution of estate of full-blood

Indians constitute laws of the United States, simply because Congress by the Enabling Act gave its consent to the State to control the devolution of such estates.

If however, the case can be construed as so holding, it should be reconsidered and overruled.

Proposition No. III

The tax as herein laid does not constitute a direct burden upon a governmental instrumentality.

The tax is not laid upon the corpus of the estate of these restricted Indians. It is not a tax assessed against their property. It is an excise tax upon the transfer of economic benefits from the dead to the living. It therefore does not constitute a direct burden upon a governmental instrumentality.

United States v. *Perkins*, 163 U. S. 625; *Plummer* v. *Coler*, 178 U. S. 115; *Murdock* v. *Ward*, 178 U. S. 139, and in the case of *United States Trust Co. of New York* v. *Helvering*, 307 U. S., at page 57; this Court beginning at page 60, says:

> "An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death. The tax here is no less an estate tax because the proceeds of the policy were paid by the Government directly to the beneficiary; the taxing power was nevertheless exercised upon 'the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.' In an analogous situation, Federal bonds exempt by statute from all taxation have been

held subject to a Federal inheritance tax. And state inheritance taxes can be measured by the value of Federal bonds exempted by statute from state taxation in any form. Similarly, the statutory immunity of War Risk Insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured."

In the case of *Landman* v. *Commissioner*, 123 Fed. (2d) 787, the following rules are announced in paragraphs 2 and 7 of headnotes:

"Paragraph 2.

"The dominion exercised over the estate of deceased full-blood restricted Creek Indian, consisting of a restricted allotment and the proceeds of oil and gas produced therefrom by Superintendent of Five Civilized Tribes was in the nature of a guardianship for the sole benefit of the deceased and her family and for her protection, and would not vest in the Government a control exercised in furtherance of public purpose essential to exempt the estate from estate taxes under the 'government instrumentality doctrine.'

"Paragraph 7.

"The net estate of a deceased full-blood restricted Creek Indian consisting of restricted allotment and proceeds of oil and gas produced therefrom under control of Superintendent of Five Civilized Tribes, was subject to estate tax imposed upon the transfer of net estate of every decedent, since the tax falls upon the transfer or shifting of the economic benefits and not upon the property and was therefore not within constitutional immunity growing out of agreement between United States and Creek Indian granting exemption to allotted lands."

In the discussion of the case at page 789, the Court said:

> "We can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward which would justify the application of the instrumentality doctrine. The power and the control of the Superintendent over the estate of the Indian ward was no more than the mere exercise of a governmental function for the benefit of a private citizen. No public purpose or end is sought to be effected, except insofar as it becomes the duty of the Government to fulfill its historical obligations to a class of its citizens, recognized as a dependent people. This is especially true when the so-called instrumentality doctrine is considered in the light of the recent decisions which bear upon this question."

See also *Superintendent of Sac and Fox* v. *Commissioner*, 295 U. S. 481.

Measured by the rules announced in the above cases and the cases of *Helvering* v. *Mountain Producer's Corporation*, 303 U. S. 376; *Graves* v. *People of the State of New York ex rel. O'Keefe*, 306 U. S. 466, and *O'Malley* v. *Woodrough*, 307 U. S. 277, the tax herein assessed does not constitute a direct burden upon a governmental instrumentality.

CONCLUSION

In conclusion, we submit there is nothing in any of the Acts of Congress pertaining to the land and the property of members of the Five Civilized Tribes which prohibits the State of Oklahoma from levying and collecting an estate tax upon the transfer of these estates; that the devolu-

tion of these estates are governed by the laws of the State of Oklahoma and not by the laws of the United States; that the case of *Childers* v. *Beaver*, 270 U. S. 555, is not controlling; that if such case should be construed as applying to the facts in the case at bar, then it should no longer be followed; that the tax as here laid does not constitute a direct burden upon a governmental instrumentality.

We therefore, respectfully pray that the writ be granted and that on final hearing, the judgment of the Circuit Court of Appeals be reversed and the judgment of the United States District Court for the Eastern District of Oklahoma be affirmed.

Respectfully submitted,

A. FRANCIS PORTA,

W. A. BARNETT,

C. W. KING,

Attorneys for Petitioners.

A. L. HERR,
Of Counsel.

December, 1942.